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STATUTES.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. .....

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
NANA M. COOPER and MARY COOPER, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, New York Life Insurance Company, respectfully shows:

Summary.

This is an action at law brought under the diversity of citizenship statute in the United States District Court for the Northern District of Oklahoma by Nana M. Cooper and Mary Cooper, respondents herein, against New York Life Insurance Company, petitioner herein. The action is for a judgment declaring the petitioner liable to the respondents upon the double indemnity clause in a life insurance policy issued by New York Life Insurance Company on the life of Conard E. Cooper, deceased, hereinafter styled

Insured, for the face amount of $36,298.00, payable in monthly installments. (R. 4)

Answer raising issues of law and fact and denying liability on the double indemnity clause was filed by petitioner. (R. 10) The respondents then filed motion for summary judgment under Rule 56 of Federal Rules of Civil Procedure. (R. 15) The motion was sustained and judgment was forthwith entered in favor of respondents and against petitioner in accordance with the prayer of the complaint. (R. 38)

An appeal from such judgment was taken by petitioner to the United States Circuit Court of Appeals for the Tenth Circuit which affirmed the judgment (R. 43). Petition for rehearing was filed (R. 53-67) and was denied without an opinion (R. 68).

Statement of the Matter Involved.

Conard E. Cooper, the Insured, died holding three policies of life insurance with the New York Life Insurance Company in which Nana M. Cooper was a beneficiary. Policies for $5,000.00 and $6,000.00, respectively, were delivered to him in October, 1918, at Wichita, Kansas, where he then resided. These policies each had double indemnity clauses which entitled the beneficiary to an additional sum equal to the face value of the policy in the event,

> "* * * death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause." (R. 21)

These two policies will be referred to hereinafter as the Kansas policies. The third policy (that sued upon in this action) had a stated commuted value of $36,298.00 payable

in monthly installments and was delivered to the Insured in January, 1931, at Tulsa, Oklahoma, where he then lived, and will be hereinafter designated as the Oklahoma policy. It had a double indemnity clause which entitled the beneficiaries to an additional amount equal to the face value of the policy if,

> "* * * death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *; provided, however, that such double indemnity shall not be payable if the Insured's death resulted from * * * any bacterial infection other than that occurring in consequence of accidental and external bodily injury." (R. 10)

(No clause expressly excluding liability for death due to bacterial infection was in the Kansas policies.) (R. 21)

The Insured having died and the petitioner having paid the face amount of the Kansas policies and made payment of the installments due of the face amount of the Oklahoma policy, the respondent Nana M. Cooper on September 11, 1943, instituted suit in the Court of Common Pleas of Tulsa County, Oklahoma, asserting liability of the petitioner on the double indemnity clause of the ($36,298.00) Oklahoma policy; and as the gist of action alleged as follows:

> "That the death of the insured, Conard E. Cooper, resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, in that, on the 27th day of September, 1942, the insured Conard E. Cooper was given hypodermic injections of morphine sulphate to relieve pain brought on by an attack of renal lithiasis; that said injections were given in usual quantities, at not too frequent intervals, by proper methods and by

skilled persons; that said injections resulted in acute opium poisoning which result was unexpected, unforeseen and unusual; that said opium poisoning brought on a respiratory collapse; that artificial respiration, including the application of a pulmotor for about three hours, was resorted to, to overcome the respiratory collapse and to restore breathing; that as a result of opium poisoning, the respiratory collapse and the efforts to restore respiration, the insured contracted pneumonia on the 29th day of September, 1942, and was hospitalized in St. Johns Hospital in Tulsa, Oklahoma; that empyema in the right thorax or pleural cavity developed as a result of the pneumonia; that the insured died on October 22, 1942, from sepsis due to empyema." (R. 32-33)

Petitioner (defendant there) demurred to the said petition on the ground that sufficient facts to constitute a cause of action were not stated. The demurrer was sustained and judgment was entered dismissing the petition. On appeal to the Supreme Court of Oklahoma this judgment was reversed and the case was remanded with directions to overrule the demurrer. On return of the mandate, order was entered overruling the demurrer. Thereafter and before answer was filed, the case was dismissed by respondent Nana M. Cooper (plaintiff there).

On May 25, 1945, while the suit on the Oklahoma policy was pending on appeal from the order and judgment sustaining the demurrer and undecided in the Supreme Court of Oklahoma, respondent Nana M. Cooper (plaintiff there) filed suit in the United States District Court for the Northern District of Oklahoma against petitioner for double indemnity benefits under the $5,000.00 and $6,000.00 Kansas policies. The gist of the complaint in that action was that death of Insured was due to accidental cause and was in all

respects substantially the same as hereinabove quoted from the petition on the Oklahoma contract in the Court of Common Pleas, except as to the amount claimed and the difference in the policy provisions in the particulars above quoted. (R. 16)

The Answer of the Petitioner (defendant there), except as to formal admissions, was that the complaint did not state a claim against the Insurer and denial that the Insured's death was due to accidental cause within the purview of the said policies. (R. 25, par. VII, VIII and IX of answer.) That case on the Kansas policies was tried to the court without a jury and judgment was for respondent Nana M. Cooper (plaintiff there), the Court making written findings of fact and conclusions of law. The Court found the incidents of death substantially as stated in the complaint; found the two policies sued upon were governed in construction by the laws of the State of Kansas; that one of the known effects of the drug morphine is depression of the respiratory center of the patient and used as a pain killer and sedative, morphine slows the respiration rate as a normal consequence; that a single one-fourth grain injection has caused complete respiratory suspension, but such an effect was only a bare eventuality. The Court found there was no accident in the administration of the morphine. (R. 28-29) The case was decided upon the point that the Supreme Court of Kansas had decided recovery could be had without any accident in the cause from which the injury eventuated, even though the injury was the result of an intended act, and judgment was rendered for plaintiff on that premise. (R. 29).

On June 4, 1947, the same day upon which respondent Nana M. Cooper (as plaintiff) dismissed the suit on the

Oklahoma policy in the State Court, this suit on the same policy was filed in Federal District Court.

In the case at bar the gist of the action is set forth in substantially the same language as had been employed in the suit on the same policy in the state court action, as hereinbefore quoted (R. 6, par. 7) It was alleged that the policy contract was entered into between the Insured and Insurer in Tulsa, Oklahoma, and there delivered to the Insured and was an Oklahoma contract (R. 5, par. 6) subject to be interpreted according to the laws of the State of Oklahoma, as to which there is agreement.

In petitioner's (defendant there) answer in the case at bar, the frame of the answer in the suit on the Kansas policies is not followed and among other defenses not specified in the action on the Kansas policies, it is specifically asserted that the external act of injecting morphine into the person of the Insured was free from accident; that if any accident occurred, such accident was not an accident due to external and violent means; that the morphine was not the sole cause of death and if it contributed to death, it was not the sole cause but was due to supersensitivity of the Insured; that it is a fact generally known to all physicians that morphine causes a respiratory collapse in some cases and is one of the known hazards of its use; and other specific defenses not pleaded in the answer in the suit on the Kansas policies. (R. 12-14, pars. XII to XIX)

After the filing of this answer and without reply and without expressly pleading *res judicata* or estoppel by judgment of either the judgment on the two Kansas policies or the decision of the Supreme Court on the demurrer, the respondent Nana M. Cooper filed motion for summary judgment alleging:

"(1) There is no genuine issue of a material fact in this suit which has not been distinctly put in issue and directly determined in her favor and against the defendant herein, by the final judgment of a court of competent jurisdiction.

"(2) There is no material question of law in this suit which has not been litigated before a court of competent jurisdiction and determined by final judgment in her favor and adversely to defendant herein." (R. 15)

To which motion certified transcript of the petition, answer, findings and conclusions, judgment of the court in the suit on the Kansas policies and certified transcript of the proceedings in the Court of Common Pleas showing petition, demurrer, judgment on demurrer, mandate of Supreme Court reversing and the dismissal of the suit by respondent (plaintiff there) were attached. There was no affidavit, deposition or other proof filed with or after the motion in support of the allegations of the motion or in proof of the claim that all questions of law and fact had been theretofore decided. (R. 15, *et seq.*) The motion was sustained and judgment was rendered forthwith and without proof other than that offered by the transcripts. (R. 38)

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

2. The judgment of the Circuit Court of Appeals was rendered in a civil action.

3. The date of the judgment to be reviewed is April 16, 1948. Petition for rehearing filed by petitioner was denied May 10, 1948.

4. It is believed that the following cases sustain the jurisdiction of this Court:

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. ed. 544;

Bradford Electric Light Co. v. *Clapper*, 284 U. S. 221, 76 L. ed. 254;

New York Life Ins. Co. v. *Jackson*, 304 U. S. 261, 82 L. ed. 1329;

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. ed. 139.

Questions Presented.

The following questions are presented:

1. The trial court, in sustaining a motion for summary judgment and rendering such judgment upon the application of the principle of estoppel by judgment, in a suit on a totally different cause of action and without affidavits, depositions or admission that in the alleged prior judgment the issues had been decided under identical conditions and circumstances, committed error, exceeded its lawful authority and deprived petitioner of the right to properly present its defense; and the affirmance of such judgment by the Circuit Court of Appeals constitutes a situation calling for supervisory action by this Court.

2. The case at bar being a suit on a cause of action not involved in the case in which judgment was rendered by the Federal court in favor of respondent Nana M. Cooper and against petitioner on the two Kansas policies, that judgment is not *res judicata*, nor can it be an estoppel against petitioner for the reason that the points decided were not decided under the identical circumstances and conditions of this case; and the Circuit Court of Appeals, it is believed,

erred in holding that the judgment of the trial court on the Kansas policies concludes the petitioner in presenting its defenses in this case.

3. The Circuit Court of Appeals, it is believed, did not follow the law of the State of Oklahoma on the question of the liability of petitioner upon the double indemnity clause of the Oklahoma policy.

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals in holding the trial court properly decided the merits of this case upon motion for summary judgment, upon the rule of *res judicata* or estoppel by prior judgment was an erroneous decision of an important question of general law and is in conflict with the weight of authority.

2. The decision of the Circuit Court of Appeals in affirming the summary judgment entered by the trial court without formal trial or opportunity to present a defense involves an important question of Federal law respecting the deprivation of a litigant of that due process of law guaranteed by Amendment V of the Constitution of the United States.

3. The decision of the Circuit Court of Appeals in affirming the summary judgment of the trial court sanctions the departure of the trial court from the accepted course of judicial proceedings, and in this case deprived the petitioner of its day in court in the presentation of its defense as to call for the exercise of the court's power of supervision.

4. The great importance of the legal principles involved to individuals, the business world and to the legal profession and the need for an authoritative and elucidating

decision defining the limits of the lawful discretion or right of the trial court to render summary judgments on motion under Rule 56 of the Federal Rules of Civil Procedure, in cases where doubt exists or proof is lacking that all issues of fact had actually been determined in a prior action, renders a decision of the point a matter of public importance.

5. The decision of the Circuit Court of Appeals in sustaining a summary judgment upon the application of the rule of estoppel by judgment, without affidavits, depositions or admission that all and each question of fact and law had been actually decided in the prior judgment, is contrary to the decision of the Circuit Court of Appeals in *Schreffler* v. *Bowles,* 153 F. (2d) 1, and the decision of the Circuit Court of Appeals of the Second Circuit in *Engl* v. *Aetna Life Insurance Co.,* 139 F. (2d) 469.

6. By the decision of the Circuit Court of Appeals holding the respondents entitled to recover upon the sole authority of the case of *Cooper* v. *New York Life Ins. Co.,* 198 Okl. 611, 180 P. (2d) 654, and upon an interpretation of that case probably in conflict with the rule and policy of the Oklahoma court evidenced by other decisions, an important question of local law was decided in a way probably in conflict with applicable local decisions.

7. The decision of the Circuit Court of Appeals as to the merits of the respondents' right of recovery under the laws of the State of Oklahoma is in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in respect to the weight properly to be accorded conflicting decisions of the highest court of a state under Federal acts and the *Erie* case in the interpretation of the laws of such state in diversity cases.

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the said Circuit Court of Appeals in the case numbered and entitled on its docket, "No. 3588, New York Life Insurance Company, a corporation, Appellant, vs. Nana M. Cooper and Mary Cooper, Appellees," to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment of the Circuit Court of Appeals for the Tenth Circuit be reversed and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem proper.

NEW YORK LIFE INSURANCE COMPANY,
By WILLIAM F. TUCKER, *Its Attorney.*

Of Counsel:
WILLIAM H. MARTIN.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

Opinions of the Courts Below.

The District Court (Judge SAVAGE) did not render an opinion. It simply entered judgment, which appears at pages 38 to 40 of the record.

The opinion of the Circuit Court of Appeals, by Judge PHILLIPS, is reported in 167 F. (2d) 651. It is in the record (R. 43, *et seq.*).

Jurisdiction.

The date of the judgment to be reviewed and other details justifying jurisdiction are set forth at page 7, *ante*, of the accompanying petition.

Statement of the Case.

The summary of the proceedings and statement of matters pertinent to the questions presented are stated in the petition and for brevity are adopted as there stated. (*Ante*, pp. 1-7.)

Specification of Errors.

The errors which petitioner will urge, if the writ of certiorari is issued, are that the Circuit Court of Appeals for the Tenth Circuit erred:

1. In affirming the order of the United States District Court for the Northern District of Oklahoma, which sustained motion for summary judgment and rendered such judgment.

2. In failure to hold that the petitioner was entitled to present its whole case and be heard according to the ac-

cepted course of judicial proceedings and that respondent had not, by her motion and exhibits or otherwise, made a case justifying summary judgment.

3. In failing to hold that under the circumstances of this case, disclosed by the record, the sustaining of the motion for summary judgment was unlawful and constituted a denial of rights of the petitioner, guaranteed by the Constitution of the United States, and particularly by Article V of the Amendments thereto.

4. In failing to remand this cause to the trial court, with directions to overrule the motion for summary judgment, and thereafter proceed according to the accepted course of judicial proceedings.

Summary of the Argument.

Petitioner adopts its "Reasons Relied Upon for the Allowance of the Writ," set forth in the petition (*ante*, pp. 9-10). For the sake of brevity they are not here repeated; and for further simplification, Reasons Nos. 1, 2, 3, and 4 will be considered under First Point; Reason No. 5 under Second Point; and Reasons Nos. 6 and 7 under Third Point.

ARGUMENT.

FIRST POINT—The sustaining of the motion for summary judgment was unwarranted by the circumstances of the case, was not justified by Rule 56 of the Federal Rules of Civil Procedure, was violative of Rule 8, and constituted an unlawful deprivation of petitioner's right to present its defense in accordance with the usual course of judicial proceedings, as guaranteed by Amendment V of the Constitution of the United States.

By sustaining the motion for, and rendering summary judgment against petitioner, the petitioner was deprived of an opportunity to present its defenses and of making a record for consideration on appeal, if the decision was considered erroneous. The burden was upon the respondent to show by affidavits, depositions or admissions that there were no issues of fact or law not already decided in the suit on the Kansas policies. Only the transcript of the suit on the Kansas policy could be considered and this being a suit on a different cause of action, that decision does not conclude the petitioner under rules of law discussed in the argument of Point 2.

One precise point on the merits in this case is whether, in the treatment of disease either by medicine or surgery, where unexpected fatal results follow due to the occurrence of one of the results of the treatment, generally known to be an effect of the treatment, but an effect much less likely to occur than beneficient effects, there is liability under the conventional clause allowing, as in this case, double indemnity in instances only where death is due solely to accidental means. This important point was not decided by the Supreme Court of Oklahoma in the case of *Cooper* v.

New York Life Ins. Co., 198 Okl. 611, 180 P. (2d) 654, nor in any other decision of that court. The rule, supported by the following authorities, is against liability under such circumstances on the ground that there is really no accident:

Preferred Accident Ins. Co. v. *Clark*, (C. C. A. 10) 144 F. (2d) 165;

Caldwell v. *Travelers Ins. Co.*, 305 Mo. 619, 367 S. W. 907;

Rapp v. *Metropolitan Accident & Health Ins. Co.*, 143 Neb. 144, 8 N. W. (2d) 692;

Evans v. *Metropolitan Life Ins. Co.*, 26 Wash. (2d) 594, 174 P. (2d) 961.

The point was made in the petitioner's answer, but the specific point has been nowhere considered or decided. Upon this defense, the petitioner claims its right to a hearing in which it can present its defenses in their full vigor, which cannot be done without evidence in this, as in most cases.

While the limits of the application of Rule 56(b) are not clearly defined, it is believed it was not intended to substitute summary judgment for trial according to the usual course of judicial procedure, except where the defense was sham or interposed for delay. An examination of the ramifications of this case clearly indicate it is not sham and that the defenses are real and material and supported by authority. In the case of *Blood* v. *Fleming*, (C. C. A. 10) 161 F. (2d) 292, the court say, referring to the application and use of Rule 56, in part: "The rule was intended to provide against the vexation and delay which come from the formal setting for trial of those cases in which there is no substantial dispute on issues of fact." Having made no proof that there were no disputed issues, it is believed the motion for summary judgment was erroneous and thereby

the petitioner has been deprived of its rights without due process of law, guaranteed by Amendment V of the Constitution of the United States.

SECOND POINT—The case at bar being a suit on a cause of action not involved in the case in which judgment was rendered by the Federal court in favor of respondents and against petitioner on the two Kansas policies, that judgment is not *res judicata*, nor can it be an estoppel against petitioner, for the reason that the points decided were not decided there under the identical circumstances and conditions of this case, the policy of insurance to be here construed being an Oklahoma, not a Kansas, contract to be interpreted by the Oklahoma, not the Kansas law, the clause in the Oklahoma policy being not identical with the comparable clause in the Kansas policies, and the defenses presented being different in important particulars from those in the suit on the Kansas policies. When the second suit is upon a different cause of action than that in a prior suit, there is no estoppel by judgment except as to the points actually decided, and the burden is upon him who claims estoppel to prove such points were actually decided.

There can be no dispute that this suit is upon a different cause of action from that in which the prior judgment was rendered on the Kansas policies.

The record shows no definitive, nor any affidavit, deposition or admission was presented with, or in support of, the motion for summary judgment, in proof that all the issues in the case at bar had actually been decided in the suit on the Kansas policies. The transcript of the petition and answer and the findings of fact were not definitive of what

was actually decided, and the burden rested upon the respondent to make proof that all questions had been decided in the prior case.

The findings of the trial court disclose that the decision in the prior suit was actually made upon the point and proposition that the case being on Kansas contracts (R. 29), and the Kansas Supreme Court having adopted the "accidental result" rule, recovery of the double indemnity was justified. What collateral facts were actually determined as a part of the decision is not shown by the transcript. The court made a few findings of fact, but the conclusions of law and the judgment do not clearly indicate what facts were actually decided.

This court has left little room for doubt as to the rules applicable to the plea of estoppel by judgment, where the suit is upon a different cause of action than that involved in the prior judgment. In addition to being a series of cases elucidating the law, it is urged the following cases fully support the contention of petitioner that its defense in this case was not barred by the judgment in the suit on the Kansas policies:

In *Cromwell* v. *County of Sac,* 94 U. S. 351, 24 L. ed. 195, this Court held there could be no estoppel by judgment unless the facts in dispute in the second case had been actually decided in the first case; and further held it was no impediment to the pleading of a defense in the second suit that it existed at the time of the first suit and was not presented as a defense.

In the case of *Nesbit* v. *Independent District of Riverside,* 144 U. S. 610, 36 L. ed. 562, it was held that judgment in the first suit constituted no estoppel with respect to the

defense of a second suit on a different cause of action, where the defense made in the second suit included an item of defense existing at the time of the defense of the first suit but not there pleaded.

In *New Orleans* v. *Citizens Bank,* 167 U. S. 371, 42 L. ed. 202, it was held there would be no estoppel unless the matter was presented under the "identical circumstances and conditions" present in the first suit.

In the case of *Commissioner of Internal Revenue* v. *Sunnen,* decided by this Court at this term, not officially reported (U. S. Sup. Ct., L. ed., 92 Adv. Ops., page 673), the Court reviews the question of *res judicata* and estoppel by judgment, cites with approval *Cromwell* v. *County of Sac, supra,* and is believed to make clear the prime consideration in estoppel by judgment is certainty that the exact question has been decided in a former action under identical conditions.

The Supreme Court of Oklahoma holds upon the authority of this Court in *Cromwell* v. *County of Sac, supra,* as follows:

> "* * * and when a second suit is upon a different cause of action, but between the same parties as the first, the judgment in the first suit operates as an estoppel in the second suit only as to every point and question that was actually litigated and determined in the first, and the first judgment is not conclusive as to other matters that might have been, but were not, litigated or decided. * * *"
>
> —*Crowe* v. *Warnarkee,* 114 Okl. 153, 244 Pac. 744.

See also, *Oklahoma Moline Plow Co.* v. *Smith,* 81 Okl. 61, 196 Pac. 962, to the same effect.

The suit here is upon a different cause of action. There is no proof that all the defenses made in this suit were

actually decided in the prior suit. Whatever the decisions made in the prior suit, they were not made under the "identical circumstances and condition" of the case at bar, it being agreed that the Kansas policies were construed by the laws of Kansas, while in the case at bar they must be interpreted according to Oklahoma law. When applied to the case at bar it is respectfully urged that the petitioner did not have the day in court in which it was entitled in this case, and the decisions of the trial court and Circuit Court of Appeals are contrary to the decisions of this Court.

THIRD POINT—The law of the State of Oklahoma respecting the interpretation of double indemnity provisions regarding payments in case of death due solely to "accidental means," has long been, and is believed, still to be that liability is limited to those cases where accidental means or accident are in the matter or circumstances preceding the injury, and are external to the body of the insured, and not due to forces put in motion by the voluntary act of the insured. The case of *Cooper* v. *New York Life Ins. Co.*, 198 Okl. 611, 180 P. (2d) 654, cited by the Circuit Court of Appeals, is believed not to have been intended by the Supreme Court of Oklahoma to change the rule of *stare decisis*, long established by prior decisions on the point, and in any event, was insufficient authority to alter the established rule.

The Supreme Court of Oklahoma in a series of cases all believed to be in complete uniformity on the point, has held that upon life insurance policy provisions equivalent to that in the case at bar, providing double indemnity in event death resulted from accidental means, liability is contingent upon there being accident external to the body of

the insured, and in the matter which preceded the injury, and that there was no liability where the death resulted unexpectedly from a course of conduct which was the voluntary act of the insured.

—*Prudential Ins. Co.* v. *Tidwell*, 163 Okl. 39, 21 P. (2d) 28;

Provident Life and Accident Ins. Co. v. *Green*, 172 Okl. 591, 46 P. (2d) 372;

Mid-Continent Life Ins. Co. v. *Davis*, 174 Okl. 262, 51 P. (2d) 319;

Bosley v. *Prudential Ins. Co.*, 192 Okl. 304, 135 P. (2d) 479.

The point is argued at length in *Prudential Insurance Company* v. *Tidwell, supra,* and in *Mid-Continent Life Ins. Co.* v. *Davis, supra,* and each case quotes and follows the decision of this court on the precise point stated above.

—*United States Mutual Accident Assn.* v. *Barry*, 131 U. S. 100, 33 L. ed. 60.

The other Oklahoma cases cited above follow but do not labor the point. It is contended that these cases established the rule of *stare decisis* on the point in Oklahoma.

The rule of these cases and cases of like import, has been dubbed the "accidental means" rule, as distinguished from the "accidental result" rule, so called, prevailing in the court of Kansas and some other courts, where recovery is sanctioned on such policy provision when there is no element of accident in the matter or events preceding the injury, although the injury is from agencies voluntarily put in motion by the insured or with his consent, if death unexpectedly results to the insured.

Obviously the result of the decision of the Circuit Court of Appeals here was to apply the "accidental re-

sult" rule, although such rule was adverse to the "accidental means" rule, the established *stare decisis* rule of the Oklahoma Supreme Court, established by the current of the decisions above cited. The point is stressed that the *stare decisis* rule in Oklahoma is in harmony with the weight of authority.

Following are but a few of the many decisions supporting the *stare decisis* rule in Oklahoma:

Northam v. *Metropolitan Life Ins. Co.*, 231 Ala. 105, 163 So. 625;

Scienger v. *Fidelity & Casualty Co.*, 178 Ky. 369, 198 S. W. 1163;

Rock v. *Travelers Ins. Co.*, 172 Cal. 462, 156 Pac. 1029;

Ramsey v. *Fidelity & Casualty Co.*, 143 Tenn. 42, 223 S. W. 841;

Caldwell v. *Travelers Ins. Co.*, 305 Mo. 619, 267 S. W. 907, 39 A. L. R. 56 (annotated).

It will be observed that in each of the cases above cited, it is asserted that the "accidental means" rule is supported by the great weight of authority, and furthermore each case is grounded as are the Oklahoma cases, on *United States Mutual Accident Assn.* v. *Barry*, 131 U. S. 100, 33 L. ed. 60.

The case of *Cooper* v. *New York Life Ins. Co.*, 198 Okl. 611, 180 P. (2d) 654, wholly relied upon by the Circuit Court of Appeals as decisive of the law of Oklahoma on the intepretation of the policy, is deemed by the Circuit Court of Appeals to decide that recovery can be had upon such an Oklahoma policy where there is no accident in the matter preceding the injury, which in this case was the injection of morphine sulphate, which it was asserted in

the petition and recognized by the court, was free from accident, if the result of the injection of morphine, though voluntary, eventuated in a chain of ills resulting in death of the insured. This decision of the Circuit Court of Appeals amounts to this: That in the estimation of the Circuit Court of Appeals, the Supreme Court of Oklahoma, in *Cooper* v. *New York Life Ins. Co., supra,* had abandoned and overruled the prior cases in favor of the "accidental means" rule of policy interpretation, and had adopted the "accidental result" rule.

Cooper v. *New York Life Ins. Co., supra,* is the decision of the Oklahoma Supreme Court on the appeal of respondent Nana M. Cooper (plaintiff there), from the judgment of the Court of Common Pleas of Tulsa County, Oklahoma, sustaining a demurrer to the petition. The sole question was whether the petition stated a cause of action, and merits of the case were not before the court. The allegations of the petition and the reasonable inferences therefrom were admitted true only for the purpose of testing the petition. In that case, the court did not disapprove any of the Oklahoma cases, nor did it purport to overrule or be in conflict with any of them. The court in fact cited as authority for the decision, the case of *Mid-Continent Life Ins. Co.* v. *Davis, supra,* one of the decisions in the series of cases creating the *stare decisis* rule, adhering to the "accidental means" rule; and *Provident Life & Accident Ins. Co.* v. *Green, supra,* a case following the case of *Prudential Ins. Co.* v. *Tidwell, supra,* also in the series of cases forming *stare decisis,* adhering to the "accidental means" rule. What was said by the court respecting the merits of the law was, we believe, not intended to prejudge the merits of the law of the case, but as a reason why it was deemed that upon the face of the petition, in the absence of a de-

fense, it stated a cause of action. The petition was held to state a cause of action by the narrow margin of a 5 to 4 decision. If the case be accorded any weight, it should be given no more weight, as against the settled rule of the court on the point, than would be accorded pure *dictum*. It is believed the court ordered the demurrer overruled not upon any consideration of any change in the principles announced in the *Tidwell* and *Davis* cases, but within the principles of law announced in such cases. Certainly it cannot be said that the point was deliberately examined and considered, nor that intent to overrule the settled law was evident. Not only was the case lacking in authority for the reasons just cited, but it was voluntarily dismissed when the mandate was returned to the trial court. It is ironical that no judgment was entered in the case whatever, the decision was in no sense binding on the Supreme Court had the cause been returned after trial on the merits, yet the decision of the Circuit Court of Appeals gives to the decision all of the virtue of *res judicata*, although the Oklahoma court never had anything before it for consideration but a petition and demurrer. Under these circumstances, the *stare decisis* rule, holding the "accidental means" rule to be Oklahoma law, should have been followed by the Circuit Court of Appeals.

In *Meredith* v. *City of Winter Haven*, 320 U. S. 228, 88 L. ed. 9, and in *New England Mutual Life Ins. Co.* v. *Mitchell*, (C. C. A. 4) 118 F. (2d) 414, certiorari denied, 314 U. S. 629, 86 L. ed. 505, the rules with reference to interpretation of state laws in diversity cases are much elucidated, and under the rules there expressed, the "accidental means" rule should have been held the law of Oklahoma.

The Circuit Court of Appeals has said that the law of Oklahoma applicable to the case at bar was settled adversely to the petitioner by the decision of the Supreme Court of Oklahoma in *Cooper* v. *New York Life Ins. Co., supra.* This, we believe, is equivalent to speculation by the court as to what the Supreme Court of Oklahoma might have decided had a case involving the question of liability for double indemnity under the Oklahoma policy been presented to that court for review after a trial on the merits (rather than a review of the single question of whether the petition stated a cause of action). The decision of the Circuit Court of Appeals in so determining the law of Oklahoma is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *New England Mutual Life Ins. Co.* v. *Mitchell, supra,* (a case involving the interpretation of the incontestable clause of a life policy in accordance with the law of Virginia) wherein that court said:

> "* * * In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established *stare decisis* rule and its limitations. Cf., *West* v. *American Tel. & Tel. Co.,* 61 S. Ct. 179, 85 L. ed. .... We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of *dicta* or other chance expressions of the judges of the local courts. * * *" (118 F. (2d) 420.)

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its super-

visory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision and judgment.

Respectfully submitted,

WILLIAM F. TUCKER,
605 Petroleum Building,
Tulsa, Oklahoma,
Counsel for Petitioner.

Of Counsel:

WILLIAM H. MARTIN,
Tulsa, Oklahoma.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1948.

No. 126

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
NANA M. COOPER and MARY COOPER, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Petitioner issued three policies on the life of Conard E. Cooper—two Kansas policies and one Oklahoma policy. Each policy provided for double indemnity, if the death of the insured was accidental as defined in the policy. The former Federal Court case was on the Kansas policies. The State Court suit was on the Oklahoma policy.(1) This suit is on the Oklahoma policy.

Both Kansas and Oklahoma adhere to the accidental result rule.

—*New York Life Insurance Company* v. *Cooper*, (C. C. A. 10) 158 F. (2d) 257;
Cooper v. *New York Life Insurance Company*, 198 Okl. 611, 180 P. (2d) 654.

(1) After remand to the trial court and entry of an order overruling the demurrer, the State Court suit was dismissed without prejudice (R. 36, 37) and the case at bar was filed.

Petitioner says that the gist of the complaint in the Federal Court suit on the Kansas policies was in all respects substantially the same as the petition in the State Court suit on the Oklahoma policy (Petition, pp. 4 and 5), and that the gist of the action in the case at bar is set forth in substantially the same language as in the State Court suit on the same policy (Petition, p. 6). Speaking of the Findings of Fact in the Federal Court suit on the Kansas policies, Petitioner says: "The court found the incidents of death substantially as stated in the complaint * * *." (Petition, p. 5.) These admissions strongly indicate there is no merit in the petition for a writ of certiorari. That such is the case we proceed to demonstrate by a detailed consideration of the petition and brief.

The points in Petitioner's brief will be discussed in their inverse order to achieve a more orderly presentation of the case. Our argument is presented under these propositions:

I.

The decision of the Supreme Court of Oklahoma in Cooper v. *New York Life Insurance Company is binding on Petitioner and on the Federal Courts, and the issue of law stands adjudicated against Petitioner.*

II.

The former Federal case on the Kansas policies adjudicated the facts in the case at bar and the Tenth Circuit Court of Appeals correctly applied the law of estoppel by judgment.

III.

There is no genuine issue of fact in this case and the motion for summary judgment was properly sustained.

And of these in their order:

I.

The decision of the Supreme Court of Oklahoma in *Cooper* v. *New York Life Insurance Company* is binding on petitioner and on the Federal Courts, and the issue of law stands adjudicated against petitioner.

This answers Petitioner's Third Point (its brief, pp. 20-25).

In *Cooper* v. *New York Life Insurance Company,* 198 Okl. 611, 180 P. (2d) 654, the plaintiff was Nana M. Cooper (a plaintiff in the case at bar), the defendant was the same defendant now before this Court, the insurance policy there sued on was the identical policy here sued on, and the allegation of the cause of death in that case is identical with the allegation of the cause of death in this case. The decision was handed down before the case at bar was commenced. The Supreme Court of Oklahoma did not depart from, but adhered to, the doctrine of *stare decisis;* it did not overrule, but followed and applied the rules of law announced in its prior decisions. To us, the language of the court on this point appears to be clear and unmistakable. We quote (198 Okl. 612, 613, 180 P. (2d) 656):

> "Since intent is a necessary element in the cause and effect of wrongful injury it is difficult to follow the reasoning of some authorities, which make a distinction between accidental means which cause a given result, and accidental results following upon the intentional use of the means employed. * * * This court has aligned itself with those authorities which recognize the unity of intent between cause and effect except where that unity is destroyed by the intervention of accident, mishap or unforeseen factors which produce unexpected results. Such intervention is deemed to be fortuitous and, in combination with cause and effect, produces an accidental result. *Union Accident Co.* v. *Willis,* 44 Okl. 578, 145 P. 812, L. R. A. 1915D, 358; *Continental Cas-*

ualty Co. v. *Clark,* 70 Okl. 187, 173 P. 453, L. R. A. 1918F, 1007; *Provident Life & Accident Ins. Co.* v. *Green,* 172 Okl. 591, 46 P. (2d) 372; *Mid-Continent Life Ins. Co.* v. *Davis,* 174 Okl. 262, 51 P. (2d) 319; *Mid-Continent Life Ins. Co.* v. *Dunnington,* 177 Okl. 484, 60 P. (2d) 1047."

After quoting from *Western Commercial Travelers Ass'n* v. *Smith,* (C. C. A. 8) 85 Fed. 401, 405, the court continued (198 Okl. 613, 180 P. (2d) 656):

> "This language was largely relied on by Mr. Justice CARDOZO in his dissenting opinion in the *Landress* case (*Landress* v. *Phoenix Mutual Life Ins. Co.,* 291 U. S. 491, 54 S. Ct. 461, 78 L. ed. 934, 90 A. L. R. 1382), which dissent this court followed, in the absence of a Federal question being involved, as the correct rule of state decision in the case of *Provident Life & Accident Ins. Co.* v. *Green, supra.*
>
> "In the instant case the unexpected results followed the recognized and the approved use of morphine sulphate as a means of alleviating pain. There was no unity of intent joining the means used and the results which followed. An unusual and extraordinary chemical reaction intervened which could not have been foreseen and which was wholly unexpected. The means used were applied externally, the reactions were immediately violent and we think, the results were purely accidental and within the terms of the double indemnity provisions of the policy."

In the light of this positive declaration by the Supreme Court of Oklahoma, and in the light of settled doctrine, Petitioner's argument (brief, pp. 20-25) can avail it nothing.[1] We particularize.

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(1) Curiously enough, the argument is a duplicate of that made by petitioner in the former Federal case with reference to the Kansas decisions, *viz.*: that Kansas does not follow the accidental result rule, and its decisions announcing that rule should be regarded as *dicta.* 158 F. (2d) 257.

Petitioner asserts that its non-liability under Oklahoma law is demonstrated by *Provident Life and Accident Ins. Co.* v. *Green,* 172 Okl. 591, 46 P. (2d) 372, *Mid-Continent Life Ins. Co.* v. *Davis,* 174 Okl. 262, 51 P. (2d) 319, and two other Oklahoma cases (brief, p. 21). The Supreme Court of Oklahoma thought otherwise, citing both the *Green* and *Davis* cases as instances of its adherence to the accidental result rule, and that court is the final arbiter of the meaning of its own decisions. Despite Petitioner's contrary assertion, the Supreme Court of Oklahoma has consistently followed the accidental result rule from *Union Accident Co.* v. *Willis,* (1915) 44 Okl. 578, 145 Pac. 812, to and including *Cooper* v. *New York Life Ins. Co.,* (1947) *supra,* which is its latest expression on the subject. Even if the contrary were true, the latest pronouncement of the Oklahoma Supreme Court is the one which the Federal Courts must follow.

—*Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538, 85 L. ed. 327.

That "the point was deliberately examined and considered" (brief, p. 24) is apparent from the portion of the *Cooper* opinion above quoted.

The cases from Alabama, Kentucky, California, Tennessee and Missouri, cited at page 22 of Petitioner's brief, have no bearing on any rules of law, as to *stare decisis* or otherwise, which may prevail in Oklahoma.

The close division of the judges—five to four—in the *Cooper* case in the Supreme Court of Oklahoma "does not touch the binding effect of that decision as a statement of the law of" Oklahoma.

—*Thurlow* v. *Waite-Phillips Co.,* (C. C. A. 8) 22 F. (2d) 781, cert. den. 278 U. S. 598, 73 L. ed. 528.

That the decision of the Supreme Court of Oklahoma was on demurrer, that there was no trial on the merits, that had the case been tried on the merits and appealed, the Supreme Court of Oklahoma would not have been bound by the opinion here relied upon (brief, pp. 23, 24) does not destroy the binding force of the opinion. The Supreme Court of Oklahoma has the power to reconsider or overrule its decisions, but the Federal courts do not.

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 85 L. ed. 1089, Moore brought suit for damages in a Mississippi court. Judgment on the pleadings was rendered against him by the trial court. Upon appeal, the Mississippi Supreme Court reversed and remanded. Thereafter Moore amended his bill to seek more than $3,000.00 damages and the suit was removed to the Federal Courts. The question presented was the binding effect on the Federal Courts of the opinion of the Mississippi Supreme Court. Note that the state decision was not on the merits, but reversed a judgment on the pleadings. This Court held that it and the lower Federal Courts were bound by the ruling of the Mississippi Supreme Court.

There is no need to multiply authority in support of this well settled rule, but see *Huddleston* v. *Dwyer*, 322 U. S. 232, 88 L. ed. 1246.

There is no conflict between the opinion of the court below (R. 43) and the opinion of the Fourth Circuit Court of Appeals in *New England Mutual Life Ins. Co.* v. *Mitchell*, 118 F. (2d) 414. The opinion below does not announce any rule of law in conflict with the rules announced in the *Mitchell* case. The Fourth Circuit Court of Appeals held that it was bound by a decision of the Virginia Supreme Court which was squarely in point and refused to follow

dicta in an earlier Virginia case (118 F. (2d) 419). Petitioner characterizes the decision of the Supreme Court of Oklahoma in the *Cooper* case as "pure *dictum*" (brief, p. 24), which is absurd.

The issue of law stands adjudicated against Petitioner by the Supreme Court of Oklahoma.

II.

The former Federal case on the Kansas policies adjudicated the facts in the case at bar, and the Tenth Circuit Court of Appeals correctly applied the law of estoppel by judgment.

This answers Petitioner's Second Point (brief, p. 17).

Both Kansas and Oklahoma adhere to the accidental result rule. The law in the two jurisdictions is the same. That has been established by the two former actions between Nana M. Cooper and petitioner.

Complaint is made that the motion for summary judgment was not supported by any affidavit, deposition or admission. It was supported by certified transcripts of the proceedings in the two former cases, which surely are of greater dignity than affidavits. Rule 56(a) provides that the motion may be made "with or without supporting affidavits." And see:

> *Fletcher* v. *Evening Star Newspaper Co.*, (App. D. C.) 133 F. (2d) 395, cert. den. 319 U. S. 755, 87 L. ed. 1708.

The Tenth Circuit Court of Appeals did not hold that the former Federal case was *res judicata*. It did hold that there was an estoppel by judgment as to the fact issues there litigated. In this, it was eminently correct.

> —*Commissioner of Internal Revenue* v. *Sunnen*, No. 227, Oct. Term 1947, 92 L. ed. Adv. Op. 673.

III.

There is no genuine issue of fact in this case and the motion for summary judgment was properly sustained.

This is an answer to Petitioner's First Point (brief 15).

The only issue before the Supreme Court of Oklahoma in the *Cooper* case (as appears from the opinion) was whether or not "the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *." It was held that the facts alleged in the petition and admitted by the demurrer required that the issue be resolved in favor of plaintiff. That was the sole issue in the suit on the Kansas policies and in that suit the facts were adjudicated. It is the sole issue here. The substantial identity of allegations of the cause of death in the former Federal suit, the State Court suit and this suit is admitted by petitioner (Pet. 4-6). In the suit on the Kansas policies the court found that morphine injections were the sole cause of death. That finding necessarily negatives the existence of all other causes. -In that case petitioner could have proved any fact that showed death was not accidental. It did not do so. It is bound by the adjudication of the cause of death.

But petitioner says (Brief p. 15):

> "One precise point * * * is whether * * * where unexpected fatal results follow * * * treatment, generally known to be an effect of the treatment, but an effect much less likely to occur than beneficient effects, there is liability under the conventional clause allowing * * * double indemnity * * *",

and claims a right to trial on this "defense".

This "precise point" appears to be alleged in paragraph XVII of the answer. (R. 13). That issue was litigated and decided against petitioner in the suit on the Kansas policies. In that case the answer denied that the death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and alleged that it resulted from physical infirmity, illness and disease. (Ans. pars. VIII, IX, XI, R. 25, 26). On the trial of that cause evidence was adduced by Petitioner as to the known effects of the use of morphine, and on such evidence the trial court found:

> "One of the known effects of the drug morphine is depression of the respiratory center. * * * Used as a pain-killer and sedative, morphine slows the respiration rate as a normal consequence, but entire collapse of the respiratory center is only a bare eventuality; in rare instances a single one-fourth grain injection has caused complete respiratory suspension." (Part of Finding VI, R. 28),

and concluded:

> "While it is true that the complete collapse of the respiratory system may follow the injection of morphine sulfate, such a result is regarded by physicians as only a remote possibility and is not to be expected." (Part of Conclusion III, R. 29),

which the Court of Appeals below properly said is also a Finding of Fact (R. 47).

Sunstroke is a known effect of exposure to the sun, and the Supreme Court of Oklahoma holds that sunstroke is an accident. (*Provident Life & Accident Company* v. *Green*, 172 Okl. 591, 46 P. (2d) 372; *Continental Casualty Company* v. *Clark*, 70 Okl. 187, 173 Pac. 453); infection is a known effect of a blistered foot, but death therefrom was

held to be an accident in the *Smith* case, (85 F. 401) which is quoted from with approval by the Oklahoma Supreme Court in *Cooper* v. *New York Life Insurance Company*. Petitioner's argument is one that long ago evoked a statement that has since been quoted often: "Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident." Hallsbury, L. C., in *Britons* v. *Turvey*, (1905) A. C. 230, 233, 2 Ann. Cas., 137.

The simple truth is that the Oklahoma Supreme Court held defendant would be liable upon proof of the facts alleged in that suit; those same facts are alleged in this suit (Compare R. 6-32) *and are conclusively established by the facts found in the former Federal suit.* (R. 27) *No play on words, no tenuous argument, can enable petitioner to escape from this simple truth.*

Defendant's answer in this case (R. 10) consists of admissions, (Pars. I to VII) allegation of failure to state a claim, (Par. VIII) averments and denials of utmost generality stating conclusions as to matters of law decided against it by the Oklahoma Supreme Court, (Pars. IX to XX) and the few "facts" alleged were decided against it in the former Federal Court suit (Pars. XV, XVI, XVII). The answer is of the type which has been commented on by many lower Federal Courts. Thus in *Engl* v. *Aetna Life Ins. Co.*, (2 Cir.) 139 F. (2d) 469:

> "Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment." (Citing cases.)

When the motion for summary judgment came on for hearing Petitioner, in the face of the showing made, could

not stand mute, suffer an adverse judgment, and then seek reversal by pointing to the general language of its answer and claiming the right to a trial. If any facts existed which justified a trial, Petitioner should have shown their existence by affidavit opposing the motion. The lower courts are unanimous in this holding.

—*Engl* v. *Aetna Life Ins. Co., supra,* (2 Cir.) 139 F. (2d) 469, 472, 473;
Wilkinson v. *Powell,* (5 Cir.) 149 F. (2d) 335, 337;
Williams v. *Kolb,* (App. D. C.) 145 F. (2d) 344;
Fletcher v. *Krise,* (App. D. C.) 120 F. (2d) 809, 812;
Schreffler v. *Bowles,* (10 Cir.) 153 F. (2d) 1, 3.

Petitioner filed no such affidavit. In view of the issues litigated and the facts found in the former Federal case we suggest it could not have done so without incurring the penalty of having the affidavit stricken as filed in bad faith or for the purpose of delay. See Rule 56(g).

We again repeat that cases from other jurisdictions, including the case of *Preferred Accident Co.* v. *Clark,* (brief, p. 16) are immaterial here. In the former Federal case, on petition for rehearing (158 F. (2d) 259) the court disposed of the *Clark* case as authority. As we have shown, both Kansas and Oklahoma adhere to the accidental result rule.

Clearly, the answer is a sham and the decision of the Tenth Circuit Court of Appeals is correct.

A motion for summary judgment pierces the formal allegation of a pleading, "* * * and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. For a further discussion of this principle see 3 Moore's Federal Practice, pp. 3174-3175. The rule is now well established in the many cases dealing with this problem."

—*Lindsey* v. *Leavy,* (9th Cir.) 149 F. (2d) 899, 901.

The lower Federal Courts are unanimous in holding that former judgments may be presented by motion.

—*Billings Utility Co.* v. *Advisory Committee, Board of Governors,* (8th Cir.) 135 F. (2d) 108;

Schwartz v. *Levine & Malin, Inc.,* (2 Cir.) 111 F. (2d) 81;

Jones v. *Zurich Genl. Acc. & Liability Ins. Co., Ltd.,* (2 Cir.) 121 F. (2d) 761;

Eller v. *Paul Revere Life Ins. Co.,* (8th Cir.) 138 F. (2d) 403;

Herzog v. *Des Lauriers Steel Mould Co.,* (D. C., E. D. Pa.) 46 F. Supp. 211;

Cf. *Sabin* v. *Home Owners Loan Corp.* (10 Cir.) 151 F. (2d) 541;

Cf. *Levinson* v. *Cohen,* (D. C., S. D., N. Y.) 31 F. Supp. 96;

Cf. *Hartman* v. *Time, Inc.,* (3 Cir.) 166 F. (2d) (Adv. Sheets) 127;

3 Moore's Federal Practice, pp. 3181, 3182, especially note 3, p. 3182.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

VILLARD MARTIN,
GARRETT LOGAN,
425 Nat'l Bk. of Tulsa Bldg.,
Tulsa, Oklahoma,
Attorneys for Respondents.

Of Counsel:
VIRGIL HICKS,
THOMAS M. FINNEY,
R. J. STANTON.